BP (Sabah) Sdn Bhd v Syarikat Jubrin Enterprise (sued as a partnership firm) & Ors

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K22-40 OF 1996
RICHARD MALANJUM J
23 SEPTEMBER 1998

Civil Procedure *— Attachment — Garnishee order made absolute — Appellant obtained judgment for payment under contract with respondent — Appellant contended respondent had more money with bank — Bank ordered to pay appellant — Whether there was debt due from bank to respondent — Whether order should be varied*

Contract *— Assignment — Absolute assignment — Contract to supply and deliver petrol and oil — First respondent assigned all rights, title and interest in contract to bank — Notification of assignment through letter — Whether failure to use 'absolute' label meant it was part assignment*

The first respondent ('Jubrin') secured a contract with Jabatan Kerja Raya Sabah ('JKR') to supply and deliver petrol and oil. Jubrin in turn arranged the supply to come from the appellant ('BP'). Subsequently by a letter ('the letter'), Jubrin notified JKR that they had assigned all their rights, title and interest in the contract in favour of the second respondent ('UOB'). The letter stated further that JKR was to pay all contract proceeds direct to Jubrin's account with UOB. BP brought an action against Jubrin claiming payment for goods sold and delivered. Judgment was given to BP. However, BP contended that Jubrin had some more money with UOB and it proceeded with garnishee proceedings. BP also applied for an order that a certain amount of money with JKR be paid to it. The senior assistant registrar ordered JKR to pay the money to UOB ('the first order'), and that UOB paid a certain amount of money to the judgment creditor ('the second order') as a result of the garnishee proceedings. BP appealed against the first order ('the first appeal') and UOB appealed against the second order ('the second appeal'). With regard to the first appeal, the issue to be determined was on the interpretation of the letter — whether it could be construed as an absolute assignment. With regard to the second appeal, the issue to be determined was whether there was a debt due from UOB to Jubrin as at the date of the garnishee order.

Held, dismissing the first appeal and allowing the second appeal in part:

(1) To determine the true construction of the letter, the substance and the surrounding circumstances must be looked at and not just the label attached to the document. It made reference to assigning all rights, title and interest in the contract payment to UOB, and the contract referred to was the contract with JKR. The letter further showed a complete surrender of the proceeds arising out of the contract. Thus, there was no merit in the contention that there was only a part assignment.

In respect of the contention that the word 'absolutely' was not used, the failure to invoke such a word did not make much difference. It is the overall tenor of the document that should be taken into account. To agree with the contention would make the labelling of a document crucial and would be contrary to the rule in construing a document (see pp 719E–F, 726F, I and 727B–C); *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 followed.

(2) The bank statement showed that there was a credit balance of RM872.58 in Account No 263–3–001897–0. Account No 263–3–001898–9 showed a debit balance and no credit balance was shown at any time. As such, there was no debt due from UOB to Jubrin. On this ground, the garnishee order absolute was varied in that it affected Account No 263–3–001897–0 and the credit balance of RM872.58 only (see pp 730I, 731A–B and 732E).

Obiter:

The existence of the debt of the first judgment debtor with the second judgment debtor at the material time would have entitled the latter to claim a lien on such funds (see p 732D).

[Bahasa Malaysia summary

Penentang pertama ('Jubrin') telah memperolehi suatu kontrak dengan Jabatan Kerja Raya Sabah ('JKR') untuk membekalkan dan menghantar serah petrol dan minyak. Jubrin sebaliknya telah menguruskan supaya bekalan itu datang daripada perayu ('BP'). Beikutannya melalui sepucuk surat ('surat tersebut'), Jubrin telah memberitahu JKR bahawa mereka telah menyerahhak segala hak, hakmilik serta kepentingan mereka di dalam kontrak tersebut atas nama penentang kedua ('UOB'). Surat tersebut selanjutnya menyatakan bahawa JKR hendaklah membayar segala hasil kontrak terus kepada akaun Jubrin dengan UOB. BP telah memulakan tindakan terhadap Jubrin menuntut pembayaran bagi barangan yang telah dijual dan dihantar serah. Penghakiman telah diberikan kepada BP. Walau bagaimanapun, BP menghujahkan bahawa Jubrin masih mempunyai lagi wang dengan UOB dan ia telah meneruskan prosiding menggarnis. BP telah juga memohon untuk mendapatkan perintah bahawa sesuatu jumlah wang yang tertentu dengan JKR hendaklah dibayar kepadanya. Penolong kanan pendaftar telah memerintahkan JKR supaya membayar wang tersebut kepada UOB ('perintah pertama'), dan agar UOB membayar sejumlah wang yang tertentu kepada pemiutang penghakiman ('perintah kedua') akibat prosiding menggarnis tersebut. BP telah merayu terhadap perintah pertama ('rayuan pertama') dan UOB telah merayu terhadap perintah kedua ('rayuan kedua'). Berhubung dengan rayuan pertama, isu yang harus ditentukan adalah mengenai pentafsiran surat tersebut — sama ada ia boleh ditafsirkan sebagai satu penyerahhakan yang mutlak. Berhubung rayuan kedua, isu yang hendaklah ditentukan adalah

A sama ada terhadapnya hutang yang kena dibayar oleh UOB kepada Jubrin sepertimana pada tarikh perintah menggarnis.

Diputuskan, menolak rayuan pertama dan membenarkan sebahagian rayuan kedua:

B (1) Untuk menentukan tafsiran sebenar surat tersebut, isi dan keadaan sekelilingnya mestilah diberikan perhatian dan bukan label yang dilekatkan kepada dokumen itu sahaja. Ia membuat rujukan kepada penyerahhakan kesemua hak, hakmilik serta kepentingan dalam bayaran kontrak tersebut kepada UOB, dan kontrak yang dirujuk itu adalah kontrak dengan JKR. Surat itu selanjutnya C menunjukkan penyerahan seluruh hasil yang berbangkit daripada kontrak tersebut. Dengan itu, tidak terdapat sebarang merit dalam hujahan bahawa hanya terdapat penyerahhakan sebahagian sahaja.

Berhubung penghujahan bahawa perkataan 'mutlak' telah tidak digunakan, kegagalan untuk menggunakan perkataan yang D sedemikian tidak memberikan sebarang perbezaan sama sekali. Maksud keseluruhan dokumen tersebut harus diambil kira. Bersetuju dengan penghujahan tersebut akan menjadikan 'labelling' dokumen tersebut penting dan akan bertentangan dengan kaedah mentafsirkan sesuatu dokumen (lihat ms 719E–F, 726F, I dan 727B–C); *Malayan Banking Bhd v PK Rajamani* E [1994] 1 MLJ 405 diikut.

(2) Penyata bank menunjukkan bahawa terdapatnya baki kredit sebanyak RM872.58 dalam Akaun No 263–3–001897–0. Akaun No 263–3–001898–9 menunjukkan baki debit dan tiada baki kredit ditunjukkan pada bila-bila masa. Oleh itu, tiada hutang F yang kena dibayar oleh UOB kepada Jubrin. Atas alasan ini, perintah menggaris mutlak itu diubah setakat mana ia menjejaskan Akaun No 263–3–001897–0 dan baki kredit sebanyak RM872.58 sahaja (lihat ms 730I, 731A–B dan 732E).

G **Obiter:**

Kewujudan hutang penghutang penghakiman pertama dengan penghutang penghakiman kedua pada masa yang material itu akan memberi hak kepada pihak yang terkemudian untuk menuntut lien ke atas dana-dana yang sedemikian (lihat ms 732D).]

H

Notes

For a case on garnishee order made absolute, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 1020.

For cases on absolute assignment, see 3 *Mallal's Digest* (4th Ed, I 1997 Reissue) paras 1567–1568.

Cases referred to

Hughes v Pump House Hotel Co Ltd [1902] 2 KB 190 (refd)

Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, Garnishee) [1988] 1 MLJ 434 (refd)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761 (refd)
Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405 (folld)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)
Seloga Java Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Evidence Act 1950 s 103
Judicature Act 1873 [UK] s 25(6)
Rules of the High Court 1980 O 49 rr 1, 3, O 73 r 1(2)

Roland Cheng (*Roland Cheng & Co*) for the appellant.
Raymond Wong (*Roderic Fernandez* with him) (*Wong & Shim*) for the second respondent.
Zaleha Pandin (State Counsel, Jabatan Peguam Besar Negeri) for the third respondent.

Cur Adv Vult

Richard Malanjum J:

Preliminary

There are two appeals to the judge in chambers before me between the same parties arising from the two decisions made by the senior assistant registrar ('the SAR') on 15 January 1998. The first appeal is by the appellant herein, namely BP (Sabah) Sdn Bhd against the decision that the third respondent, namely the director of Jabatan Kerja Raya, Sabah, pays the sum of RM542,188.86 to the second respondent, namely United Overseas Bank (M) Bhd ('the first appeal'). And the second appeal is by the garnishee, United Overseas Bank (M) Bhd against the decision ordering it to pay to the judgment creditor the sum of RM 586,880.26 ('the second appeal').

Background Facts

For the purpose of these appeals, these background facts are common to both. And the present dispute between the parties arose from an action in Suit No K22–40 of 1996. Briefly, in that action, the appellant claimed against Syarikat Jubrin Enterprise ('Jubrin') for payment of goods sold and delivered. It was not in dispute that Jubrin secured a contract with the third respondent (contract No HQ 38/95(S)) to supply and deliver petrol and oil for a period of three years to various districts in Sabah. Jubrin, in turn, arranged the supply to come, inter alia, from the appellant. Differences,

however, arose between the appellant and Jubrin. Hence, the action was not only against Jubrin but also against the second respondent, United Overseas Bank (M) Bhd. After a full trial, judgment was given to the appellant. However, as against the second respondent, the sum involved was only RM 394,000. It has since paid the appellant the sum of RM694,000. But it is the stand of the appellant that Jubrin has some more money with the second respondent. Thus, it proceeded with a garnishee proceeding. The appellant also applied under O 73 r 1(2) of the Rules of the High Court 1980 ('the RHC') for an order that the money amounting to RM542,188.86 with the third respondent be paid to it. Both matters were heard simultaneously by the learned SAR which involved the hearing of oral evidence of witnesses. Thereafter, the impugned decisions were made. There was also a stay order made in respect of the garnishee order but no appeal was lodged against that stay order.

The first appeal

It is common ground between the parties in this first appeal that the issue to be determined is on the interpretation of the letter dated 8 July 1995. However, learned counsel for the appellant further submitted that a subsequent letter dated 13 July 1995 should also be taken into consideration in finding the true meaning of the first letter. Hence, having heard the respective submissions of learned counsel for the parties, I agree that the primary issue to determine is on the true construction of the letter dated 8 July 1995 ('the letter'). To do that, I bear in mind what was held in the case of *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 in that the substance must be looked at and not just the label attached to the document. Of course, it is also essential that the other surrounding circumstances should be considered.

The thrust of the contention of learned counsel for the appellant is that the letter should not be construed as an absolute assignment. And he listed a host of reasons, inter alia:

(i) that the word 'absolute' is absent in the letter;

(ii) that it is only part of a security document and thus, only a charge within the meaning of s 4(3) of the Civil Law Act 1956 ('the 1956 Act');

(iii) that if it was an absolute assignment, then the previous payments should have been paid directly to the second respondent and not through the accounts of the first respondent. The second respondent could not get the payments in its own name as it was only a privilege as stated in the letter of 13 July 1995. Further, 'if there was an absolute assignment, there should be a mechanism for the transfer of the legal title of the JKR (third respondent) money to the second respondent on 8 July 1995 and subsequently, for it to revert to the first respondent after the cheques are paid off. In this case, the legal title of the money has always been with the first respondent.' Thus, the second respondent was only the collecting agent of the first

respondent. Moreover, the letter of 13 July 1995 can be said to have amended the letter;

(iv) that there was nothing to assign as at 8 July 1995 since the performance bond was only granted on 25 July 1995, and that should also defeat the point on assignment of choses in action;

(v) that the second respondent did not come to court with clean hands since it continued to grant facilities to the first respondent over and beyond the sum stated in the performance bond;

(vi) that there cannot be an absolute assignment of part of a contract. In this case, the performance bond was only for the sum of RM1.8m whereas the whole contract was worth RM36.9m;

(vii) that the contention of the second respondent that there was an absolute assignment contradicted its defence of set-off and lien. Further, the second respondent did not inform the court at the first opportunity available; and

(viii) that the letter of discharge dated 20 August 1996 ('the discharge letter') stated that the second respondent would have no further claim upon its issuance.

In respond, learned counsel for the second respondent submitted that the appellant should be estopped from denying that there was an assignment since that fact was pleaded by the appellant in its amended statement of claim. Other rebuttals tendered for the second respondent are as follows, inter alia:

(a) that it is a 'misconception that an assignment by way of security cannot be an absolute assignment. In fact, most assignments are by way of security to banks and financial institutions';

(b) that the mode of payment is not the determining factor. The document has to be looked at and in this case it is the letter;

(c) that all assignments are in fact assignments of 'choses in action'. Hence, there is no issue of nothing to assign;

(d) that under s 4(3) of the 1956 Act, it is not necessary that consent must be obtained from the debtor. It is a matter between the assignor and the assignee;

(e) that although the wordings in the letter may be similar to some decided cases, its interpretation need not be the same. There are also cases with similar words used but given different meanings;

(f) that the application of the appellant is under O 73 of the RHC. Hence, the second respondent can come in as a claimant;

(g) that there is no question of the second respondent coming to court with unclean hands. In the action proper, the second respondent was cited as a defendant only. Thus, it was not required to disclose everything at the trial;

(h) that in fact the letter speaks of an assignment of the whole contract and not part of it; and

(i) that the discharge letter clearly stated that the assignment would be discharged after 3 April 1996. And there is no dispute that the money in question concerns works done before that date.

For the third respondent, it was submitted that payments to the second respondent were in compliance with the court order of 15 January 1998 and all other procedures.

As the key issue is on the interpretation of the letter, I am of the view that it is appropriate to reproduce it in entirety shorn of its formalities. And it reads thus:

Date: 8 July 1995

Pengarah Kerja Raya
Jabatan Kerja Raya
Ibu Pejabat
Kota Kinabalu
U/P: Jurutera mekanik kanan

Tuan,

Re: Notice of assignment of contract proceeds in respect of the supply and delivery of petrol and oil for a three year period to various districts of Sabah (Contract No HQ 38/95(S))

Your contract Ref No DPWQC15/17/698/1993 dated 13 June 1995 refers.

Please be notified that *we have assigned all our rights,* title *and interest in the above contract payment due and payable in favour of Chung Khiaw Bank Ltd, Tuaran branch.* (Emphasis added.)

Please be further notified that you are to forthwith pay all contract proceeds direct to our account (Account No 263–3001–897–0) with the said bank of No 9 & 10, Jalan Datuk Dusing, 89200 Tuaran, Sabah. The said bank is authorized to accept all such contract payment on our behalf and any receipt given by the said bank shall be deemed a good receipt and discharge for the sums paid and as if such receipt was issued by us.

Please be further advised that this authority to remit all proceeds to Chung Khiaw Bank Ltd C/A 263–3001–897–0 is irrevocable and cannot be revoked without written consent of the said bank.

Please acknowledge service by endorsing the duplicate copy of this letter and returning the same to the said bank.

Yours faithfully

For Jubrin Enterprise

Signed

Cc M/S Chung Khiaw Bank Ltd
Tuaran Branch, Sabah
BP (Sabah) Sdn Bhd
Yisu Industrial Centre, Lorong Kombang
Off KM 12, Jalan Tuaran, Kota Kinabalu

For completeness, it may also be in order that I should include two other letters, namely, the letter of 13 July 1995 and the discharge letter. The letter of 13 July 1995 reads:

Date: 13 July 1995

Chung Khiaw Bank (M) Bhd,
Tuaran Branch,
No 9 & 10, Jalan Datuk Dusing,
89200 Tuaran

Tuan-tuan,

Contract No HQ 38/95(S)
The supply and delivery of petrol and oil for a three year period to various districts of Sabah

As requested by the contractor, this office will make all payments under the above contract in the name of the contractor, Syarikat Jubrin Enterprise, and channel them to you for the credit of the contractor's Account No 263–3001–897–0.

Please note that this promise is given as a privilege and does not bind the government in any way.

'Berkhidmat untuk negara dengan bersih, cekap dan amanah'

Saya yang menurut perintah,

Signed
(Tan Geok Kui)
bp Pengarah Kerja Raya

MW/

sk Syarikat Jubrin Enterprise
PO Box 10955,
88810 Kota Kinabalu

And the discharge letter reads as follows:

20 August 1996

Pengarah Kerja Raya
Jabatan Kerja Raya
Ibu Pejabat
88582 Kota Kinabalu

Dear Sir

Subject: Supply and Delivery of Petrol and Oil for Three Years to Various Districts of Sabah — Contract No HQ 38/95(S)

The above refers.

We hereby give our consent to your department for making progress payments under the above contract to Syarikat Jubrin Enterprise or his nominated payee for the supply and delivery of petrol and oil made after 3 April 1996 based on the deed of assignment dated 15 August 1996 and in consideration of Shell Timor Sdn Bhd for providing a bankers' guarantee for RM1,847,899.55 to you as replacement for our bank guarantee No PG CTUA95/19 dated 25 July 1995 which is to be discharged.

A However, for supplies made on or before 3 April 1996, you are to continue to make payment to our bank for the credit of Syarikat Jubrin Enterprise's Account No 26330018970.

Yours faithfully
For Chung Khiaw Bank (M) Bhd

B

Signed
Foo Ngee Kee
Vice President and Manager
Sabah Branches

C Having reproduced the more relevant documents, I think I should now note some of the judicial pronouncements by our courts as regards the law on absolute assignment and s 4(3) of the 1956 Act. That section reads:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, D trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the E notice, and all and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

In the case of *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761, the court came to the conclusion that the assignment was absolute after considering what should be the proper construction of the documents F before it. His Lordship Peh Swee Chin FCJ said this, at p 774:

> ... Therefore, on a true construction of the agreements, the question is this, was the beneficial interest of the assignor in the estates of both the deceased father and the deceased mother transferred unconditionally to the assignee? If the answer is affirmative, the assignment is absolute.

G And his Lordship went on to say thus at p 775:

> ... In any event, compliance with s 4(3) is not a prerequisite to the validity of an assignment, which is to be determined in the usual ways. Even without complying with s 4(3), eg even without notice of the assignment to such debtors, for the sake of arguments, the assignment would have been valid in H equity in any event against the assignor.
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> ... If an assignment is valid in law or legal (ie legally binding on the assignor), then it is valid or legal and compliance with s 4(3) is not essential to make it valid or legal as stated. Section 4(3) has not made any alteration in the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes I having to borrow the name of the assignor or if the assignor is uncooperative, to join the assignor as a co-defendant.

And in another case of *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365, his Lordship Chong Siew Fai CJ (Sabah & Sarawak) outlined the requirements of s 4(3) when he said this at pp 370–371:

> We have considered s 4(3) of the Civil Law Act 1956 referred to by counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:
>
> (1) that the assignment must be in writing under the hand of the assignor;
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> (2) that the assignment must be absolute and not by way of charge only; and
>
> (3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.
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> If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.
>
> As to the assignment in writing, no particular form is necessary but it must be absolute, ie one that purports to pass the entire interest of the assignor in the chose in action. Thus, in *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295, Jenkins LJ dealing with s 136(1) of the Law of Property Act 1925 (English), the equivalent of which in our law is s 4(3) of the Civil Law Act 1956, said (at p 299 F–H):
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> > 'It is, no doubt, true that s 136(1) does not require any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The subsection does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question.'
>
> Looking at the deed of assignment dated 18 January 1983, we are convinced that the document, from the point of the wording or language therein used, is capable of constituting a valid assignment under s 4(3) of the Civil Law Act 1956. There is evidence that the deed dated 18 January 1983 was signed by a proper officer on behalf of the assignor, or at least there is no dispute or challenge to that. Thus, conditions (1) and (2) above are fulfilled.

Another case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 also discussed the provision of s 4(3) of the 1956 Act. This case made reference to some English decisions on what may or may not be an absolute assignment. His Lordship Seah FJ at pp 269–270 went on to consider those cases which dealt with s 25(6) of the Judicature Act 1873 (in pari materia with our s 4(3)) in this way:

> ... We would first of all refer to two cases, viz *Comfort v Betts* [1891] 1 QB 737 and *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190 where the courts came to the conclusion that the documents amounted to an absolute assignment, not purporting to be by way of charge only. In the former case, it was held that an assignment of a debt or legal chose in action may be absolute within the Judicature Act s 25(6) although a trust is thereby created in respect of the proceeds of such debt or chose in action in favour of the assignee. In the latter case, the plaintiff on 7 March 1901 signed and gave to Lloyd's Bank, the following instruction:

A 'In consideration of your continuing a banking account with me the undersigned, and by way of continuing security to you for all moneys due or to become due to you from me alone, or jointly with others, either on the said account or otherwise, I hereby assign to you all moneys due, or to become due, to me from the Pump House Hotel Co Ltd, of Llandrindod Wells, under or by virtue of a certain contract B dated 1 November 1899, and made between the said company of the one part and myself of the other part (being a contract for completion of the new pump room and for making certain alterations and additions to the Pump House Hotel, Llandridod Wells) and all other moneys, if any, due or to become due to me from the said company, including all moneys due or to become due for extras in connection with the works C contemplated by the said contract; and I hereby empower you, on my behalf, and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see to the application thereof; also, if necessary, to sue for, or take such other steps as you may think necessary D for enforcing payment of the moneys hereby assigned, or any part thereof, and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expense of recovering the moneys hereby assigned are to be paid out of the amount recovered; and I hereby undertake at your request and my cost to do and execute all such further acts, deeds, and things as you E may reasonably require for giving full effect to the security hereby created.'

It was held that the above-mentioned instrument, having the effect of passing the whole right and interest of the assignor in the moneys payable under the building contract to the assignees by way of security, was an absolute assignment (not purporting to be by way of charge only) within the F meaning of s 25(6) of the Judicature Act 1873.

The other two authorities we would like to refer to are *Mercantile Bank of London v Evans* [1899] 2 QB 613 and *Durham Brothers v Robertson* [1898] 1 QB 765 where a contrary conclusion was reached by the courts. In the *Mercantile Bank* case, the plaintiffs made an advance to a customer who executed the following assignment:

G 'In consideration of your placing to my credit today the sum of £200, I hereby assign to you the whole of my rights and interest under the agreement dated 1 June 1897 as security for the repayment on demand of the said sum of £200 and any further sum or sums that you may from time to time hereafter advance to me either directly or by way of overdraft or otherwise howsoever, and I hereby appoint you my nominees H in pursuance of the provisions of the said agreement, with power to exercise all my rights thereunder, either in my name or your own; and I hereby appoint you my irrevocable attorneys in the behalf.'

It was held that the assignment was not an absolute assignment within the meaning of s 25(6) of the Judicature Act 1873.

I In the latter case, a firm of building contractors delivered to the plaintiffs a document in the following terms:

'Re Building Contract, South Lambert Road — In consideration of money advanced from time to time, we hereby charge the sum of

> £1080, which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you.'

It was held that the document was not 'an absolute assignment' (nor purporting to be by way of charge only) within s 25(6) of the Judicature Act 1873 and that the plaintiffs could not recover in the action.

Commenting on the *Mercantile Bank* case in *Hughes*' case, Mathew LJ said at p 195:

> '... general terms were used in making the assignment, but, when the whole instrument was looked at, it appeared that what was intended was only to assign so much of the debt or chose in action as would provide security for a debt of £200 ... . Upon that becoming apparent, it was held that the true character of the interest given was that of a charge only ... .'

It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 and the action must be brought in the name of the assignee ... . In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four comers of the instrument itself.

Now, the contents of the letter, in my view, are quite obvious. Paragraph 2 therein makes reference to assigning 'all our rights, title and interest in the above contract payment'. And the contract referred thereto is the contract with the third respondent. Thus, there is no merit in the contention that there was only a part assignment.

It may be argued that it would be most unreasonable to allow the second respondent to have all the payments when the sum under the performance bond was limited to only a certain sum. To a third party, that may be the case but I do not think the parties involved should be questioned on how they handled their business affairs. After all, there was no clear evidence adduced that the arrangement had solely arisen due to the performance bond. In fact, the contrary appears to be true. This can be inferred from the fact that the second respondent even had to give its consent to the third respondent as per exh F (the discharge letter) of the affidavit of Liang Sie Wey affirmed on 14 March 1997. Incidentally, the implication from the discharge letter seems to me to have demolished any belief that the letter was amended by the letter of 13 June 1995.

In respect of the contention that the word 'absolutely' was not used, I do not think the failure to invoke such a word could make much difference. In the final analysis, it is the overall tenor of the document that should be taken into account. Even in the case of *Hughes*, such word was not used. Yet the court there found that the assignment was absolute.

As regards the point that there was no absolute assignment through the letter, with respect, I cannot agree. Paragraphs 3 and 4 of the same show nothing less than a complete surrender of the proceeds arising out of the contract. And the appellant knew of such an arrangement as a copy of the letter was sent to it. That probably explains the pleading of the appellant as contended by learned counsel for the second respondent. Hence, I agree that the appellant should be estopped from denying the existence of such an assignment. To agree with the contention of the learned counsel for the appellant would make the labeling of a document crucial. But that would be contrary to the rule in construing a document as laid down in *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405. In that case, his Lordship Mohamed Dzaiddin SCJ had this to say, at p 410:

> In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance ... .

On the point that there was nothing to assign at the material time, I think that argument is based on the premise that the assignment was limited to the sum stated in the performance bond. But as indicated earlier, the letter encompasses a wider effect than as proposed by learned counsel for the appellant. And I agree with learned counsel for the second respondent that an assignment normally relates to 'chose in action'.

Learned counsel for the appellant also raised the point that upon the issuance of the discharged letter, the second respondent had no longer any claim to make. That, of course, is quite misleading as it is clearly stated therein that payments for any supplies made on or before 3 April 1996 should continue to be affected by the arrangement of the parties. And when learned counsel for the second respondent asserted that the sum in question was in respect of supplies before 3 April 1996, I heard no challenge from learned counsel for the appellant.

As regards the points of coming to court with unclean hands and the failure to apply to vary the Mareva injunction obtained earlier on by the appellant, I find no substance in them. As correctly pointed out by learned counsel for the second respondent that, at that material time, there was no necessity to raise any question of assignment. Further, as argued that since the appellant has come to court under O 73 of the RHC, there is nothing to prohibit the second respondent from coming to stake a claim. To that I agree.

Finally, on the fact that there was no direct payment to the second respondent from the third respondent, I do not think that that should undermine the legal position of the letter of having created an absolute assignment. After all, there was no authority tendered to support that such arrangement should be part and parcel of the requirements of a valid absolute assignment. And I do not think that is a prerequisite as s 4(3) of the 1956 Act stipulates nothing of that sort.

As for the other points raised for the appellant, I do not think I need to discuss them in any detail. Suffice it to say that I find no merit in them. Accordingly and for the reasons stated hereinabove, I dismiss this appeal and affirm the decision of the learned SAR. Costs for the second and third respondents are to be borne by the appellant here and below and to be taxed unless agreed.

The second appeal

Under this second appeal, the second judgment debtor, United Overseas Bank (M) Bhd as a garnishee is appealing against the garnishee order absolute of the learned SAR thereby ordering the payment of RM586,880.26 to the judgment creditor by the second judgment debtor.

It is the contention of learned counsel for the second judgment debtor that a garnishee order is only effective on the day of its service. And in this case it should be 4 March 1997. Order 49 r 1 and r 3 of the RHC were referred to in support of that preposition. The case of *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, Garnishee)* [1988] 1 MLJ 434 was also cited.

As at 4 March 1997, learned counsel said that there was no longer any money due from the second judgment debtor to the first judgment debtor. He added that the account the judgment creditor alleged to have had the money in was not a subject of the Mareva injunction. Learned counsel disclosed that the first judgment debtor had in fact two accounts with the second judgment debtor, namely, Account Nos 263–3–001897–0 (non-checking account) and 263–3–001898-9 (checking account). Only the first account was a subject of the injunction. And although it could not be denied that money was paid into the second account prior to 4 March 1997, such sum was used by the second judgment debtor to reduce the debit balance the first judgment debtor had with the former. According to learned counsel, the two officers of the second judgment debtor gave evidence of such a fact and they were open to cross-examination.

As an alternative argument, learned counsel for the second judgment debtor submitted that even if there was money due, his client was entitled to use it to set off debit balances of the first judgment debtor by reason of being the banker. The first judgment debtor, according to learned counsel, owed his client in excess of RM1.5m at the material time.

In response, learned counsel for the judgment creditor conceded on the point pertaining to the effective date of a garnishee order. But he asserted that there was money due to the first judgment debtor at the material time as the second judgment debtor admitted it, save that the payment was 'earmarked'. And this was how learned counsel put it:

> Garnishee 'earmarked' RM586,012.12 for JKR cheques paid into Account No 263–3001–898–9 after 11 April 1996 because suspect that cheques covered by Mareva injunction. 'Earmarking' is admission of non-absolute assignment ... . Earmarking concedes that monies belong to first judgment debtor ... . Hence, UOB monies are a 'debt' to first judgment debtor and can be garnished under O 49 r 2.

A The other points raised by learned counsel are, inter alia:

(1) that the debt due under O 49 r 1 of the RHC means 'a sum payable in respect of a liquidated money demand recoverable by action' and refers to earmarked monies. As the second judgment debtor had earmarked the payment of RM586,012.12, such amount became
B due and payable;

(2) that there should be no set-off and lien allowed as the banking relationship between the garnishee and the first judgment debtor was still subsisting;

(3) that it is for the garnishee to object to the order being made absolute.
C In this case, 'no evidence of set-off and lien until after garnishee nisi filed on 4 March 1997;

(4) that to allow set-off and lien now would circumvent the Mareva injunction. The garnishee acted at its own peril for not applying to vary the Mareva injunction;

D (5) that the 'garnishee has dirty hands having failed to comply with Mareva orders and wilfully withheld information at the trial';

(6) that there can be no lien as cheques were cashed and monies collected on behalf of the first judgment debtor and 'represents indebtedness by the garnishee to customer. The garnishee cannot have lien on own
E indebtedness. The garnishee could not have credited monies to the first judgment debtor's accounts without varying Mareva';

(7) that 'although there is no money shown now, the fact that the appellant (second judgment debtor) admitted earlier and that they should not be now allowed to bring fresh evidence, it should now be
F taken that there is money in the account';

(8) that the second judgment debtor was merely a collecting agent of cheque and thus, by merely crediting them to reduce the first judgment debtor's overdraft, did not make the former a holder in due course;

(9) that 'even if set-off and lien were allowed, impossible to grant set-off
G and lien to the garnishee (second judgment debtor) because the garnishee's SIC dated 15 March 1997 to permit set-off and lien was not heard. Charging order on UOB monies took effect on 4 March 1997, well before SIC dated 15 March 1997. Hence, even if variation allowed, garnishee nisi takes precedence'; and

(10) that payment into the account of the first judgment debtor and set-
H off would be contradictory.

In reply to the above contentions, learned counsel for the second judgment debtor submitted that his client came in as a competing creditor. As such, the court has to look at other creditors before making the order absolute. And he explained that no evidence of being a creditor was adduced at the
I trial proper as it was not the appropriate time. But it should not detract the fact that the second judgment debtor had priority over other creditors. Learned counsel further submitted that the 'words "earmarked" and "funds available" were used in the trial. But we did not earmark the fund for the

judgment creditor. Neither are we conceding the funds available for the judgment creditor. We say that we are taking the funds as we are prior creditor. The court should not be blinded by the words used. Should look at the account produced. No money available. No separate account set up. The account was already in overdraft and when payment came in, it was swallowed by the overdraft. The appellant (second judgment debtor) cannot be stopped from showing no money available. The rules allow a creditor to come anytime before order made absolute. Mareva injunction did not create priority to the judgment creditor.'

Now to begin, I think the law on garnishee proceedings is quite settled. And this is how Lim Beng Choon J put it in *Kedah Kelang Papan Sdn Bhd* at p 43:

> From the principles enunciated in the aforesaid cases, the following propositions can safely be distilled:
>
> (1) No garnishee order can be made unless some person, at the time when the order is made, is indebted to the judgment debtor. If there be a debt in presenti, of course an order can be made to attach the debt.
>
> (2) If there is not a debt payable in presenti, but there is a debt in existence, debitum in presenti, but payable in the future, such an order can still be made with regard to the debt whether legal or equitable.
>
> (3) The words 'or accruing' are intended to apply to those cases in which there are debitum in praesenti solvendum in futuro (debts owed at present time payable in the future). It is not enough to show that it is very probable that there soon will be a debt; it must be shown that there is a debt.
>
> (4) A debitum in praesenti not yet actually payable is nevertheless a debt which is represented by an existing obligation.

I have no reason to disagree with his Lordship on his synopsis of the law.

The crucial issue, therefore, is to determine whether there was a debt due from the second judgment debtor to the first judgment debtor as at 4 March 1997. This is a question of fact to be considered on the evidence adduced in this case since the second judgment debtor has disputed any liability.

Although the learned SAR called for evidence, yet, in her ruling, it was not indicated whether she rejected the testimonies of the witnesses called. But on perusal of the notes of proceeding, I find that the evidence is very much a matter of examining the bank statements as tendered (P1–P13). Moreover, as this is an appeal to the judge in chambers, it is in fact a rehearing of the matter. (See *Seloga Java Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97.)

It is not in dispute that as at 4 March 1997, there was a credit balance in the sum of RM872.58 in the Account No 263–3–001897–0. Thus, that sum has therefore been properly attached.

The larger dispute is on the Account No 263–3–001898–9. And firstly, I find that this account was not affected by the Mareva injunction obtained by the judgment creditor. As such, it was not on the same footing as the first account.

A On perusal of the bank statements as tendered (P1–P13), it is quite obvious that as from the month of April 1996 to the end of March 1997, they show debit balances. In particular, between 28 February 1997 and 31 March 1997, the debit balance exceeded the sum of RM900,000. No credit balance was shown at any time. As such, I agree with learned counsel for the second judgment debtor that as at 4 March 1997, there was B no debt due from the second judgment debtor to the first judgment debtor. On this ground alone, I should allow this appeal in part and vary the garnishee order absolute made by the learned SAR.

From the cross-examination by learned counsel for the judgment creditor of PW2, Mr Lo Shun Phin, an officer with the second judgment C debtor, it was suggested that the bank statements as tendered were incorrect. However, other than that bare assertion, I find no evidence adduced that that was the case. And since it was the judgment creditor which made that assertion, the onus should be on it to establish such a fact (see s 103 of the Evidence Act 1950). As it had failed to do so, those bank statements (P1– D P13) should be taken as correct.

As regards the earmarking of the funds, I find that the officers of the second judgment debtor had given the reason for doing so. According to PW2, the funds were earmarked 'because we were not sure whether this money was subjected to the injunction granted by the court.' And in answer to an earlier question, PW2 said this: E

> Q: Can you confirm that the earmarked fund of RM381,307.29 means that Syarikat Jubrin can draw on this account?
>
> A: No.

It was also put to PW2 thus: F

> Put: The actual earmarked funds is (sic) RM586,012.12 as at 31 March 1997 based on the testimony of Mr NK Foo given at the trial.
>
> A: No.
>
> Put: RM381,307.29 or RM586,12.12 was earmarked because the bank had reason to suspect that these monies were covered by the injunction.
>
> G A: Yes.

In re-examination, PW2 was asked:

> Q: 'Earmark' means the customer cannot withdraw it?
>
> A: Yes, but the bank can override that and debit the account.

H And on being referred to P1, his answer was:

> All the figures on the right column are debit figures. Earmark does not prevent the CR & DR of account by bank. Only customer cannot withdraw. All the credits in the statement went towards reducing the overall outstanding OD balance. Normal practice to debit account when there are charges to I the account although the facility has been withdrawn.

Thus, the ear-marking was not an indication that the funds belonged to the first judgment debtor and that it was intended to defeat any potential claim on them. It should also be noted that it was not disputed that the

first judgment debtor owed the second judgment debtor a substantial sum at the material time. As such, it is quite reasonable to assume that the funds would have been taken to reduce the outstanding account without any delay if not for the doubt over the extent of the injunction order. Hence, I find no substance on the point of earmarking as raised by learned counsel for the judgment creditor. And I do not think the submission of counsel at the trial proper or the testimony of a witness thereof should be deemed to close all avenues for the second judgment debtor to dispute any liability in a garnishee proceeding. The crucial point is whether there was a debt owing and due to the first judgment debtor at the relevant time from the second judgment debtor. As shown in the bank statements (P1–P13) the Account No 263–3–001898–9 was in debit-balance as at 4 March 1997.

In view of my conclusion hereinabove, I do not think it is necessary for me to dwell into the issues of lien and set-off as submitted by learned counsel for the second judgment debtor. Suffice it to say that the existence of the debt of the first judgment debtor with the second judgment debtor at the material time would have entitled the latter to claim a lien on such funds.

As for the other points submitted by learned counsel for the judgment creditor, I do not think they bear any merit as to change my conclusion.

Accordingly, for this second appeal, I allow it in part and hereby vary the garnishee order absolute made by the learned SAR in that it should only affect Account No 263–3–001897–0 and specifically on the credit balance of RM872.58. I further order that in view of the result of this appeal, the judgment creditor should pay to the second judgment debtor two-thirds of the costs here and below to be taxed unless agreed.

First appeal dismissed. Second appeal allowed in part and garnishee order varied.

Reported by Jafisah Jaafar